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PATRIOTISM AND THE PROFESSION

"I am not of the opinion of those gentlemen who are against disturbing the public repose. I like clamor where there is an abuse."—BURKE.

The Bar Association of the city of New York has recently considered a highly suggestive report of one of its committees, recommending the elimination of some of the many technicalities of practice in New York, and urging certain other changes designed to expedite the administration of justice in that State. It is high time some such step was taken, for practice under the New York Code of Civil Procedure—otherwise known as the "New York Mode of Evil Procedure"—has become so complicated that no one but a specialist can hope to avoid its pitfalls, and even the expert in its mysteries frequently finds himself ensnared. Abundant proof of this could easily be furnished, but perhaps it will suffice to state that this code, originally a modest little book which could readily be carried in a coat pocket, has now grown to three huge, Webster-dictionary-like volumes, containing thousands upon thousands of hair-splitting and often totally irreconcilable decisions. Under its protection dilatory motions and frivolous appeals may be employed to delay a trial on the merits almost indefinitely, and any ingenious trickster can involve the real issues of a simple cause until honest litigants are exhausted or driven from the courts in disgust.

Such tampering with the law—outrageous though it is—would be of merely local importance, however, if it reflected a condition of affairs wholly peculiar in New York. But it does not. Technicalities have been steadily creeping into the procedure of every State in the Union for many years, and the law's delays—

always more or less of a reproach to the profession—are fast becoming a scandal. Local pride may incline one to challenge this statement and, of course, the situation is not equally bad in all jurisdictions. But every practitioner of experience must admit that the general tendency of procedure throughout this country to-day is to exalt technicalities at the expense of truth and to countenance obstructive tactics which permit, if they do not invite, a denial of justice. Practice of this kind is not confined to the disreputable element of the Bar. It is sanctioned by custom, regulated by rule, and generally indulged in, if not favored, by all sorts and conditions of attorneys.

Yet, face to face with this situation, the Bar, as a whole, has taken no effective action—and upon it, in large measure, rests the responsibility. That the lawyers of the country can check or cure many of the existing evils will not be denied by any member of the profession who is acquainted with the practical routine of the courts. It is no answer to say that the duty of judges and lawyers is to administer the law as they find it, and not as they might like to find it, and that it is the province of the people, through their legislatures, to make such changes in the statutes as may be necessary to effect any needed reform. Members of the Bar who seek to shift the burden of responsibility in this fashion forget that they are officers of the court charged with a far higher function than that involved in any clientage. To their keeping is confided the dignity and the honor of the court, and if justice be mocked with impunity they cannot, and they should not, escape censure for the result.

The condition is quite serious enough to justify the thoughtful consideration of every self-respecting and intelligent member of the profession. When sham defenses are gravely urged by juggling advocates and solemnly considered by the bench; when causes which should be disposed of in a day are permitted to drag on for years; when successive appeals, not only allow but require a third, fourth and even a fifth retrial of the same case; when justice, enmeshed in red tape technicalities, is rendered practically impotent against flagrant offenders and offenses, is it any wonder that there is a general lack of confidence in the administration of justice? That distrust has taken the form of lynchings in communities whose civilization has been a boast; of cynical indifference to the law on the part of the powers that prey, and of oppressive defiance of it by intrenched privilege. It is finding

reflection in the public press, in the novelist's pages and in the dramatist's themes. The signs of the times are everywhere apparent.

It is idle to shut our eyes and pretend that this situation does not exist. It is futile to press a warning finger on the lips and frown on open discussion of the facts, lest it tend to impair public confidence. There has been a deal of solemn nonsense talked about "attacking the courts" whenever criticism is aimed at legal or judicial evils. Silence on this subject has long since ceased to be a virtue. It is, at best, but a condonation of existing abuses which places the profession in an attitude that should not commend itself to those who have its best interests at heart. The time has certainly arrived when we have got to recognize the ugly fact that an unhealthy popular distrust of the law, as now administered, exists throughout the general community. The disease is sporadic in some sections and epidemic in others, but it is rapidly spreading and it affects the very life of the nation. Lest this be deemed an exaggerated statement, let us examine it for a moment.

The welfare of every country is, of course, involved in its administration of justice, but the welfare of America absolutely depends upon it. In this respect our country occupies a peculiar and, in some respects, a unique position among the nations of the earth. Our whole government rests on a judicial foundation. No matter how lax our business or political morality may be; no matter what corruption may be rife in the land; no matter what public or private usurpations may be attempted, as long as our judiciary is above reproach and our administration of the law effective, there can be no real danger to the republic. Behind every legislature from the Congress downward, and behind every official from the President to the pettiest office holder, there sits a dominant court. Even from the people themselves there is protection and appeal, for no statute can remain upon our books without the sanction of the Bench. The history of the world affords no exact parallel to this. Certainly no government has ever existed of which it could be so truly said that its foundation was the administration of law and justice.

If this be so, is not any undermining of our legal groundwork a matter of grave national concern? Nay, more. Is not the loyalty of those who countenance or abet such undermining seriously impeached?

This aspect of the question fairly raises the issue of patriotism. There is something more at stake than mere professional ethics. But it may be asked if there is any justification for the implied charge that the administration of justice in this country is being undermined by the complicated procedures, legal technicalities and obstructive tactics employed in our country to-day. Surely no proof of this ought to be required by any lawyer in active practice. President Taft in his last message to Congress refers to changes in our judicial procedure as the "greatest need in our American institutions," and he characterizes the delays in our courts as "archaic and barbarous."

Two and a half years ago charges of maladministration were preferred against the Borough President of Manhattan, New York City. After a full hearing of the accused official, Governor Hughes sustained the charges and removed him. Did that retire him from office? It did not. The Board of Aldermen, to whom the duty of selecting his successor was confided, promptly reappointed him to succeed himself. This rank usurpation was naturally challenged in the courts, but no final decision was reached for almost two years, when all but a few weeks of the offender's term of office had expired.

Here, then, was a case which involved no dispute whatsoever as to the facts, and which ought to have been decided by the courts without a moment's delay. Yet the result was that justice was practically defeated and the people robbed of all real representation. Why? Because of the judges? Not at all. They nullified the action of the Aldermen with fairly commendable promptness when once the issue was presented to them. It was the system of procedure that permitted the case to be kept in the courts for two years and enabled the transgressor to defy the law.

One of the most distinguished municipal officials in this country lately gave the writer his experience in attempting to purge his department of incapable and corrupt subordinates. "We brought them to trial on carefully prepared charges," he declared. "We gave them a full and fair hearing, and dismissed them when the evidence of their guilt was overwhelming, and the result was that, one after another, they appealed to the courts, and, searching the record for technical defects which had no bearing whatever upon the merits, succeeded, in every instance, in persuading the courts to order their reinstatement. Then we

determined to fight fire with fire, for allow these men to remain in the service which they had disgraced, we would not. We accordingly watched for an opportunity to catch one of the worst offenders napping, and at last we got it. He violated a technical rule of his department and this violation was susceptible of documentary proof. It really called for no more than a mild rebuke, but it gave us the right to dismiss, and on this trivial excuse we brought the fellow to book. Had there been nothing behind our action it would have been a monstrous injustice. But as it was we stood on the technical charge. He appealed again, but this time we were sustained by all the courts. That taught us how to play the game. But it's a game I don't like, and if anybody can respect the legal system that makes it not only possible but necessary, his ideas of the proper administration of justice differ radically from mine."

Another authority on this subject—if another be needed—is Mr. Justice Brewer of the Supreme Court. One of the cases he cites to illustrate the existing condition of affairs, involved the testimony of a witness who stated that a person called Mary was present when a certain conversation took place. He was then asked what Mary had said. This was objected to and the objection sustained. On the exception to this ruling an appeal was taken and the Appellate Court reversed the decision of the lower tribunal and, holding that the excluded testimony should have been received, ordered a new trial. On this second trial the same question was asked and elicited the information that *Mary said nothing!*

Would it be possible to conjure up a more laughable travesty on justice than this? Yet there is not a lawyer of wide experience who has not, time and again, witnessed similar burlesques of the law in his own practice. But dear as humor is to the hearts of all Americans, we can ill afford to suffer the procedure of our courts to supply such sorry jesting for the community at large.

Opposition to this dangerous trifling does not involve any attack upon the courts. The technical, obstruction-favoring judge is very largely the victim of existing conditions. The Bench is recruited from the Bar, and it is unreasonable to expect the majority of its occupants to rise superior to their environment. If they attempted to do so, all but the very strongest would court failure in advance. In many jurisdictions the power

of the judges has been restricted until they have become, as a distinguished jurist has put it, mere "moderators" with little or no initiative or authority. In England it is the judge who "tries" the case, and Englishmen cannot understand why we speak of lawyers "trying" cases. But *we* understand it, and our use of the word shows where the dominating influence lies. How often does a judge originate a defense or raise any issue of his own motion? Hair-splitting, technical decisions are usually the result of contentions insisted upon by forceful advocates. Very little of the exhausting delay which vitiates the authority of our court proceedings emanates from the Bench. All such matters are largely within the control of the Bar.

But the fact is that many lawyers have become so accustomed to the trifling with truth and mockery of justice involved in the vicious practices which have crept into our procedure, that they are not alive to the resulting dangers to the whole body politic. Upon this sort of man movements like that initiated by the New York Bar will probably have a salutary effect. But no reform worthy of the name will or can result from a mere promulgation of rules. Before anything really effective can be accomplished the profession must realize that they are individually and collectively responsible for a grave menace to the national welfare. The whole tone and attitude of the Bar toward technicalities and delays has got to undergo a complete change. Once it is understood that public opinion, as represented by the best element in the profession, is adverse to a continuation of the present system, obstruction and legal jugglery will become as "bad form" with us as they are in the courts of England. Not a day passes but affords its opportunity for each individual member of the Bar to exert his influence to this end. Every time he refuses to avail himself of a technicality—every time he discourteously subterfuge—every time he shows scorn of the quibbler and obstructionist, he does his part to raise the tone of the profession. And therein lies the open secret of any lasting reform. Patriotism demands that the legal profession whose members, as officers of the court, are quasi-public servants, shall protect the administration of justice in this country by refusing to give further countenance to the abuses which are tending to bring it into disrepute.

The issue is clear cut and the desired result perfectly practical. Lawyers may legitimately differ about nice distinctions in legal

ethics or hold varying views of the ideals of the profession. But theories do not largely affect the existing situation. It is "a condition that confronts us," and that condition squarely presents the question whether the Bar of this country will control the technicality nuisance and expedite justice, or suffer the matter to pass into other and less expert hands. Every instinct of citizenship and professional pride demands that this subject should be widely agitated by those whose training and experience best qualifies them to cope with it, and the agitation ought to be continued until the prestige of the courts is completely restored. The task demands unselfish and fearless action on the part of every active practitioner, but the cause is worth it. The tricky limb of the law, the professional hireling and the legal bravo will not respond to this high duty. On the contrary, they will doubtless continue to take advantage of any and all rules to further their own ends. But as Lincoln said: "A moral tone ought to be infused into the profession which should drive such men out of it," and permit their betters to practice law without stooping to methods which not only affront decency, but thwart the ends of justice.

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